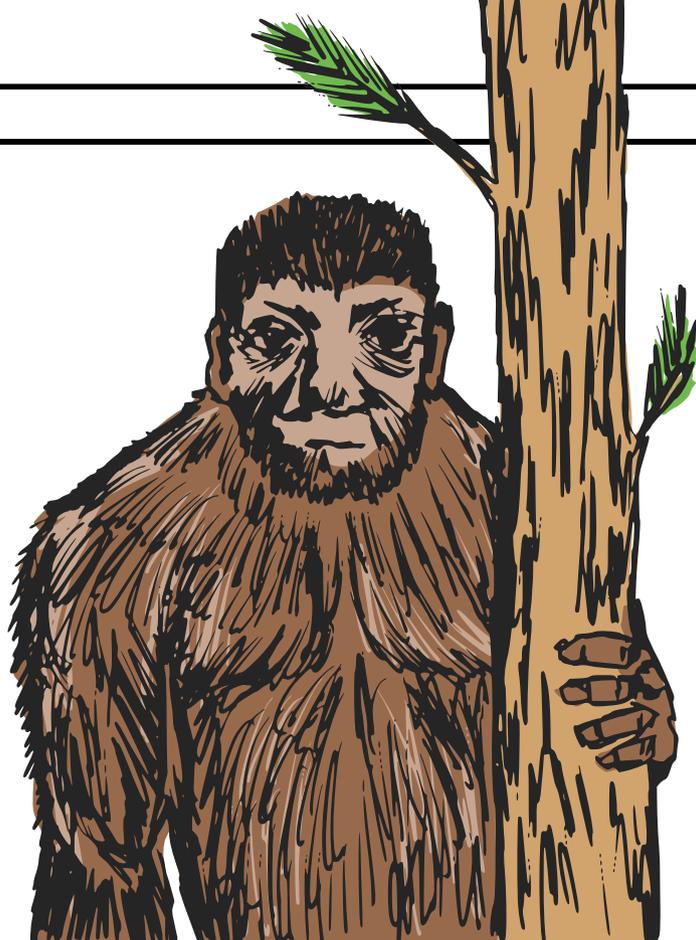




BY JACK TADMAN

# On the Hunt for Canadian Gaming Bigfoot

## Quasi-gambling games of skill in Canada



*The television series “Finding Bigfoot” follows the four members of the Bigfoot Field Researchers Organization as they search for evidence in support of Bigfoot.<sup>1</sup> After nine seasons, ninety episodes, and two spin-offs<sup>2</sup>, the Bigfoot Field Researchers Organization has yet to find convincing evidence of Bigfoot’s existence.*

In the Canadian gaming field, we have our own Bigfoot. Part of Canadian gaming folklore, this “Canadian Gaming Bigfoot” is a game that appears to be quasi-gambling but is actually a game of skill. There have been many claims of Canadian Gaming Bigfoot sightings, but these claims are either untested (e.g., daily fantasy sports, penny auctions), or upon closer inspection and a review of the evidence (i.e., by a Canadian court), determined by courts to be either a game of chance or mixed chance of skill (i.e., not Canadian Gaming Bigfoot). In May 2018, after years of searching, Canadian Gaming Bigfoot may have been found: the GotSkill game described in *Play For Fun Studios Inc. v. Registrar of Alcohol, Gaming and Racing*.<sup>3</sup>

### What is GotSkill?

GotSkill is a game played for real-money on a video terminal with a touchscreen. It is found in bars and

other establishments throughout Ontario.

Like a slot machine, GotSkill has a reel display that spins to reveal prizes. However, unlike a slot machine, a player is given information about the potential next win of the machine. Using information about the potential next win of the machine, the player chooses whether or not to play. If the player chooses to play, the game proceeds through two stages.

The first stage is known as the “amusement phase.” In the “amusement phase” onscreen animations resembling a slot machine (reels) are presented to a player. If the potential win is not zero, the animation reveals a winning line combination or scatter pay.

The second stage is known as the “skill task.” The skill task consists of a cursor moving back and forth at a constant speed across an area with 21 bars. Each bar is assigned a percentage value of between 55% and 110%. Once

the player presses the “stop button,” the cursor stops moving. The challenge is to stop the cursor as close to the middle of the area as possible. The closer the cursor is to the middle when it stops, the greater the percentage. If the player stops the cursor in the middle of the area, the player receives 110% of the player’s win during the amusement phase. The outcome of the skill task depends entirely on the player’s hand-eye coordination. Once the game is complete, the player’s “actual win” is the product of the percentage value obtained on the skill task and the amount won during the amusement phase.

It was not disputed by the parties in *Play for Fun* that the “skill task” component of GotSkill is dependent solely on skill and not chance.

### A Game of Skill

Avid readers of Canadian Gaming Lawyer know that a “game” for the

purposes of the Canadian Criminal Code means a game of chance or a game of mixed chance and skill; “chance” means the “systematic resort to chance involved in many games such as the throw of dice and the deal of cards” and is distinguished from “the unpredictables that may occasionally defeat skill;”<sup>4</sup> and in order for an activity to be a “game” under the Code, players must have a chance to both win and lose money or money’s worth.

Below are additional principles that Canadian courts have identified as requirements for a game to be considered a game of skill:

- Any chance present in a game must not be introduced for the purpose of defeating skill;<sup>5</sup>
- Players must control the game and not be at the mercy of a machine where skill is not the only element;<sup>6</sup> and
- Systematic chance must not only be missing from the gameplay, but must also be missing from the awarding of prizes.<sup>7</sup>

### The Play for Fun Decision

For most of the *Play for Fun* decision, it appeared that the court would hold that GotSkill was, in substance, a game of chance or mixed chance and skill. Justice Schreck rejected the argument of Play for Fun Studios that GotSkill should be considered from the perspective of placing a single wager. Under this interpretation, the player knows how much he or she stands to win or lose before deciding to play

and wins or loses an amount of money depending entirely on her skill in completing a skill task.<sup>8</sup>

Instead, Justice Schreck agreed with the Registrar of Alcohol, Gaming, and Racing (the “AGCO”). The AGCO took the position that GotSkill should be considered from the perspective of how it would be played by an ordinary person. (i.e., multiple times during a playing session in order to see the potential next win for each wager). From the player’s perspective, the potential next win is unknown, and is the result of chance. This element of chance is what induces players to keep playing.<sup>9</sup>

### “However”

In a plot twist that would surprise the most seasoned bibliophile, Justice Schreck began the next paragraph with the word “however” and went on to write that that “the fact that some elements of the game are out of the player’s control does not necessarily make GotSkill a game of mixed chance and skill.”<sup>10</sup> The court accepted that a player who is able to continuously obtain 110 per cent on the skill task would ultimately win more than he or she lost.<sup>11</sup> In other words, if a player has the skill to obtain 110 per cent on the skill task a certain percentage of times, GotSkill will return, on average, more than 100 per cent to the player. Based on this fact, Justice Schreck held that “the player who has enough skill can ‘beat’ the machine, so the machine cannot ‘defeat the ability of the player to obtain favorable results”<sup>12</sup> Therefore, according to Justice

Schreck, GotSkill is not a game of chance or mixed chance and skill and is not prohibited by the Code.

### Discussion

If *Play for Fun* is ultimately accepted as good law, our understanding of what constitutes a game of skill in Canada will be clarified to include games which include elements of chance, but if played properly by a player exercising skill and control, offer a return to the player of more than 100 per cent.

There is inherent difficulty in establishing a skill task that will be acceptable from both a business and legal perspective. If a skill task is too easy, and a game could potentially return more than 100 per cent to a player, the game may not be financially viable. If a player obtaining a return of more than 100 per cent is unreasonably hard, due to a task being so challenging that the player is no longer in control of the machine, or if a player is required to complete the skill task at a near perfect rate, or if the court decides that a maximum return to player (e.g., 100.1 per cent) is subterfuge, a game may not be legally viable.

The AGCO has already filed a Notice of Appeal with the Ontario Court of Appeal. The appeal will be heard on June 18, 2019.<sup>13</sup> In the meantime, Play for Fun Studios appears to have found the best evidence to date of Canadian Gaming Bigfoot. [CGL](#)

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1. Explainer for our non-North American readers: Bigfoot, also known as Sasquatch, is part of North American folklore, and is a hairy, upright-walking, ape-like animal which is between 6 and 9 feet.

2. The two spin-offs are *Finding Bigfoot: Further Evidence and Finding Bigfoot: Rejected Evidence*

3. 2018 ONSC 5190 [hereinafter *Play for Fun*].

4. *R. v. Ross et al.* (1968), 70 D.L.R. (2d) 606, [1968] S.C.R. 786, 1968 CarswellOnt 16 (S.C.C.), [hereinafter *Ross*]. At issue in *Ross*

was whether contract bridge is a game of skill, chance, or mixed chance and skill.

5. *Ibid.* at 791.

6. See, e.g. *McGarey v. R* (1974), 19 C.R.N.S. 82, 6 C.C.C. (2d) 525 (S.C.C.).

7. *R. v. Topchka* 34 WWR. 97, [1960] S.C.R. 898.

8. *R. v. Quiz It Trivia Inc.* (1989), 4 C.R. (4th) 234.

9. *Supra* note 3 at para 27.

10. *Ibid.* at para 28

11. *Ibid.* at para 38. This principle is set out in *R. v. Balance Group International Trading Inc.* (2002), 162 C.C.C.(3d) 126 (Ont.C.A.) at para. 3.

12. *Ibid.* at para 39.

13. *Info Bulletin No. 92: Got Skill Game in Licensed Establishments: UPDATE – AGCO to Ontario Court of Appeal – June 18, 2019, February 25, 2019. Retrieved on March 20, 2019 at <https://www.agco.ca/bulletin/2019/info-bulletin-no-92-got-skill-game-licensed-establishments-update-ago-ontario-court>*